

a

KONTENA NASIONAL SDN. BHD.

v.

PRIMA SHIPPING SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

b

[CODE NO. D2-22-556 OF 1989]

2 FEBRUARY 1990

SHIPPING: Collateral charter party - Disponent owner - Prima facie fraud.*c**ARBITRATION:* Arbitration - Section 6 of the Arbitration Act 1952 - Contract between 2 parties - Collateral charter party with third party - Cargo unavailable for loading - Claim for compensation - Privity of contract - Arbitration clause - Stay of proceedings - Section 25(2), (3) - Fraud - Discretion - Disponent owner - Whether collateral charter party null and void.*CONTRACT:* Collateral charter party with third party - Privity of contract - Whether null and void - Knowledge of plaintiff.*d*

This is an application for a stay of all further proceedings pursuant to s. 6 of the Arbitration Act 1952.

e

The plaintiff company is a freight forwarder for the Malaysian Government. The plaintiff contracted with the defendant, a shipping company for the latter, to carry a consignment of rice purchased by the Lembaga Padi and Beras Negara from Bangkok to the Malaysian ports of Pasir Gudang and Prai. A charter party dated 11 December 1987 was entered between them but was only executed on 23 December 1987.

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As the defendant did not own a vessel, it chartered one called M.V. Balder Jiangchow which belonged to Kian Hin Leong Maritime Management Ltd. of Hong Kong ('the owners') and a collateral charter party was signed between the defendant and the owners on 18 December 1987.

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The vessel arrived in Bangkok on 12 January 1988, but no loading could be done as the cargo was not available. The owners threatened to pull their vessel away and claim for dead freight.

However, upon representations made, the owners were prepared instead to claim compensation for the delay. On 6 February 1988 the vessel started to load. On 8 February 1988 the defendant received a claim for compensation from the owners for the sum of US\$115,630 which the defendant passed to the plaintiff for payment.

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On 10 February 1988, the owners' solicitors sent a final letter of demand to the defendant for the sum of RM115,630 within 24 hours after completion of loading, failing which the owners would exercise their right of lien on the cargo.

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After receipt of this letter of demand, the plaintiff on 15 February 1988 paid compensation under protest and on a without prejudice basis to the solicitors of the owners as stakeholders, after the defendant had refused to accept payment on behalf of the owners. The vessel then left Bangkok on 14 February 1988 with its cargo and upon discharging at the designated Malaysian ports, the owners claimed the compensation money from their solicitors.

On 23 February 1988 the defendant presented their bill for the freight to the plaintiff for the sum of RM480,200.

However, before making payment, the plaintiff notified the defendant that since they had paid compensation of US\$115,630, to the owners on behalf of the defendant, they are entitled to set off the compensation paid against the freight due, and on 14 March 1988, issued a cheque for RM280,240.36 being the balance of freight due to the defendant, despite the defendant's protest that the plaintiff could not unilaterally deduct the compensation from the freight and to that end the defendant maintain that the plaintiff still owed them RM151,934.64 under the charter party.

The plaintiff on their part, have taken the stand that they were not obliged to pay compensation to the owners in the first place as there was no privity of contract between them. The plaintiff contend that the parties liable to pay compensation are the defendant themselves pursuant to the collateral charter party entered by the defendant with the owners dated 18 November 1987 and it was for that very reason that the plaintiff paid the compensation conditionally on account of the defendant and not voluntarily, thus enabling them to have the compensation deducted from the defendant's freight. However after settling their account with the defendant, the plaintiff also maintain that they have overpaid the defendant by RM147,715.50 and in this suit seek a refund of that sum from the defendant.

Quite apart from the claim for the refund, the plaintiff are also seeking a declaration that the charter party dated 11 December 1987 is null and void on the ground that it was fraudulently obtained and for that reason oppose the application for stay by relying on s. 25(2) and (3) of the Arbitration Act 1952.

Held:

[1] Prior to the execution of the charter party the plaintiff had, by fax dated 15 December 1987 asked the defendant particulars of the vessel for onward transmission to their underwriters. The defendant supplied the particulars by fax dated 18 December 1987, identifying the owners and managers of the vessel.

[2] On 8 January 1988, the plaintiff wrote a letter to the defendant enclosing a copy of the addendum to clause 22 of the charter party to be endorsed by the defendant. In the addendum, it was mutually agreed between them that notwithstanding what was earlier agreed in clause 22, freight will henceforth be paid directly to OHM Maritime Sdn. Bhd. of Port Klang, an associate company of the defendant.

[3] Since the amendment was mutually agreed, the plaintiff's allegation that the amendment was unilaterally done is without any basis whatsoever.

[4] The 4 telexes sent by the defendant had not misled the plaintiff in any way, as the plaintiff knew since 18 December 1987 that the defendant were not the owners of the vessel.

[5] The facts clearly show the existence of a dispute between the parties. Moreover, the plaintiff expressly admitted in their fax dated 10 May 1988 addressed to the defendant that a dispute has arisen which should be arbitrated upon.

[6] As the plaintiff had failed to establish a *prima facie* case of fraud against the defendant and since the parties have mutually agreed to have all disputes relating to the charter party decided by an arbitral forum, the Court had accordingly exercised its discretion and stayed all further proceedings in this suit pending arbitration pursuant to s. 6 of the Act.

[Case to proceed to arbitration.]

- a Case referred to:**
Lai Siew Wah Sdn. Bhd. v. Ng Chin [1988] 1 CLJ (Rep) 152
- Legislation referred to:**
Arbitration Act 1952, ss. 6, 25(2), (3)
- Other source referred to:**
On the Law of Arbitration, Russel, 12th Edn., 187
- b**
For the plaintiff - S. Kanawagi; M/s. Khana & Co.
For the defendant - F. Dorairaj; M/s. Nahappan & Peri

JUDGMENT

Siti Norma Yaakob J:

- c** In this application for a stay of all further proceedings pursuant to s. 6 of the Arbitration Act 1952, (the Act), the following facts have been established to be undisputed.
- As the official freight forwarder for the Government of Malaysia, engaged in the business of freight forwarding of all government contracts, the plaintiff had contracted with the defendant, a shipping company, for the latter to carry a consignment of rice (cargo) which had been
- d** purchased by the Lembaga Padi dan Beras Negara (LPN), from Bangkok to the Malaysian ports of Pasir Gudang and Prai. A charter party was entered into between them and although it is dated 11 December 1987, the defendant only executed it after 23 December 1987.
- As the defendant did not have their own vessel to transport the cargo, it was forced to charter the M.V. Balder Jiangchow, a vessel belonging to Kian Hin Leong Maritime Management Ltd. of Hong Kong (the owners) and in this respect, a collateral charter party
- e** was signed between the defendant and the owners on 18 December 1987.
- The vessel arrived in Bangkok on 12 January 1988, but no loading could be done as the cargo was not available. As the vessel was already committed by the owners with other charterers, any prolonged delay, must necessarily land the owners in breaches of their contractual obligations to the other charterers and when there was no sign of the cargo, the
- f** owners threatened to pull their vessel away and claim for dead freight.
- However upon representations made, the owners were prepared instead to claim compensation for the delay and on 30 January 1988, they presented a claim for US\$88,500 for detention on the defendant. The defendant however passed the claim to the plaintiff as they, the defendant, had taken the stand that the delay was not caused by them but on the failure of the plaintiff to have the cargo available for loading.
- g** The plaintiff acknowledged receipt of the claim but they counter offered a lesser sum which was rejected by the owners and when the owners threatened to pull their vessel away, a meeting was held in Bangkok where the plaintiff were able to convince the owners that the cargo would be loaded by 5 February 1988.
- There was no loading done on 5 February 1988, although part of the cargo was available for
- h** loading and in disgust, the owners indicated that they would order their vessel to sail unless compensation was paid.
- On 6 February 1988, the vessel started to load and on 8 February 1988, a meeting was held between the plaintiff and defendant to discuss the owners' claim for compensation. On the same day, too, the defendant received a fresh claim for compensation from the owners for
- i** the sum of US\$115,630 which the defendant passed to the plaintiff for payment.

By 9 February 1988, loading was almost completed and when there was no sign of payment of the compensation, the owners' solicitors sent a final letter of demand dated 10 February 1988 to the defendant, claiming payment of compensation of US\$115,630 within 24 hours after completion of loading, failing which the owners would exercise their right of lien on the cargo.

a

When this notice of demand was conveyed to the plaintiff and fearing that their cargo would be sold by the owners to offset their compensation claim, the plaintiff on 15 February 1988, under protest and on a without prejudice basis, paid the compensation claimed to the solicitors of the owners as stakeholders after the defendant had rejected to accept payment on behalf of the owners.

b

Following the payment, the vessel left Bangkok on 14 February 1988 with its cargo and upon discharging the cargo at the designated Malaysian ports, the owners claimed the compensation money from their solicitors.

c

On 23 February 1988, the defendant presented their bill for the freight to the plaintiff for the sum of RM480,200.

However, before making payment, the plaintiff notified the defendant that since they had paid compensation of US\$115,630 to the owners on behalf of the defendant, they are entitled to set off the compensation paid against the freight due, and on 14 March 1988, issued a cheque for RM280,240.36 being the balance of freight due to the defendant, despite the defendant's protest that the plaintiff could not unilaterally deduct the compensation from the freight and to that end the defendant maintain that the plaintiff still owes them RM151,939.64 under the charter party.

d

The plaintiff on their part, have taken the stand that they were not obliged to pay compensation to the owners in the first place as there was no privity of contract between them but when confronted with the prospect of their cargo being sold by the owners, they had reluctantly made payment of the compensation under protest. The plaintiff contend that the parties liable to pay compensation are the defendant themselves pursuant to the collateral charter party entered by the defendant with the owners dated 18 November 1987 and it was for that very reason that the plaintiff paid the compensation conditionally on account of the defendant and not voluntarily, thus enabling them to have the compensation deducted from the defendant's freight. However, after settling their account with the defendant, the plaintiff also maintain that they have overpaid the defendant by RM147,715.50 and in this suit seek a refund of that sum from the defendant.

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Quite apart from the claim for the refund, the plaintiff are also seeking a declaration that the charter party dated 11 December 1987 is null and void on the ground that it was fraudently obtained and for that reason oppose the application for stay by relying on ss. 25(2) and (3) of the Arbitration Act 1952.

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The charter party contains an arbitration clause at clause 39 with wide terms as follows:

Any dispute that may arise under this charter party to be settled by arbitration, each party appointing an arbitrator, and should they be unable to agree, the decision of any umpire elected by them to be final. Arbitration to be in Kuala Lumpur.

h

It is in reliance of this clause that the present application is made by the defendant to stay all proceedings under s. 6 of the Act.

Since the plaintiff rely on s. 25(2) of the Act to resist the application, the question arises as to whether that subsection has the effect of declaring the entire charter party null and void.

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a Reading that subsection together with subsection (3), I consider that the effect of subsection (2) is only to render the arbitration clause in the agreement unenforceable but not the other provisions of the agreement. In this case that would be the unenforceability of clause 39 of the charter party and the law on this is best expressed by Russel “*On the Law of Arbitration*”, 12th Edn., 187 in the following manner:

b Where fraud is charged, the Court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so unless a *prima facie* case of fraud is proved.

In this case the party charging the fraud is the plaintiff and they are also the party objecting to arbitration and to that end, the plaintiff must prove a *prima facie* case of fraud before I can exercise my discretion in their favour under s. 25(3) of the Act. See the case of *Lai Siew Wah Sdn. Bhd. v. Ng Chin* [1988] 1 CLJ (Rep) 152.

c

The plaintiff have set out the particulars of fraud at para. 27(a) - (g) of their statement of claim and I shall deal with such particulars (a) - (c) individually and (d) - (f) collectively.

d (a) The defendant had fraudulently accepted the plaintiff’s offer by fax dated 4 December 1987 with an undertaking that they will charter a vessel in order to accept, and fulfill the plaintiff’s offer.

The fax in question contains nothing more than the particulars of the offer made by the plaintiff to the defendant with a plea that the defendant nominate a suitable vessel urgently. There is also a handwritten note made by an officer of the defendant that the defendant was going to charter a vessel. Perusing this fax, I consider that there is nothing expressed in the fax to substantiate the allegation of fraud, and to that end the plaintiff fail miserably to prove the alleged fraud in particular (a).

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(b) By defendant fraudulently entering into the written charter party on 11 December 1987, with the plaintiff, as a disponent owner of the vessel M.V. Balder Jiangchow, the defendant imply that they had beneficial use of the vessel when they knew they were not.

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By this allegation what the plaintiff seek to establish is that they were not aware of the owners of the vessel. The phrase “disponent owner” is widely used amongst charterers and shipowners and it covers a charterer who can dispose of a ship without being the owner of it. On the facts of the case before me, the owners of the vessel are Kian Hin Leong Maritime Management Ltd. of Hong Kong, the charterer is the plaintiff and the disponent owners the defendant.

g

As I have stated earlier, although the defendant executed the charter party after 23 December 1987 as evidenced by the plaintiff’s letter of the same date, the charter party had been backdated to 11 December 1987. However, prior to its execution, the plaintiff had, by fax dated 15 December 1987, asked the defendant particulars of the vessel for onward transmission to their underwriters. The defendant supplied the particulars also by fax dated 18 December 1987 identifying the owners and managers of the vessel. Thus even before the charter party was sent to the defendant for execution, the plaintiff were already aware who were the owners of the vessel and that the defendant had merely chartered the vessel from the owners for the purpose of fulfilling their obligations under the charter party.

h

(c) The defendant had fraudulently made an amendment to the charter party on 8 January 1988 as disponent owner of vessel Balder Jiangchow thus making freight payable to OHM.

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OHM stands for OHM Maritime Sdn. Bhd., Port Klang, an associate company of the defendant. **a**

Clause 22 of the charter party contains particulars of all documents to be submitted before freight can be paid directly to the defendant.

On 8 January 1988, the plaintiff wrote a letter to the defendant enclosing a copy of the addendum to clause 22 of the charter party to be endorsed by the defendant. In the addendum, it was mutually agreed between them that notwithstanding what was earlier agreed in clause 22, freight will henceforth be paid directly to OHM Maritime Sdn. Bhd., Port Klang. Apart from this amendment all other terms, conditions and exceptions to the charter party remain unchanged. **b**

Since the amendment was mutually agreed, the plaintiff's allegation that the amendment was unilaterally done is without any basis whatsoever. **c**

Particulars (d) - (e) relate to 4 telexes dated 14 January 1988, 20 January 1988, 27 January 1988 and 15 February 1988, sent by the defendant to the plaintiff and by these telexes, the plaintiff allege that the defendant had fraudulently held themselves out as disponent owners.

From these particulars too, the plaintiff attempted to establish that the defendant had, through the 4 telexes, misrepresented that they were owners of the vessel when in reality they were not. **d**

As I have stated earlier the plaintiff had been aware since 18 December 1987 that the defendant were not the owners of the vessel and since the plaintiff have by para. 4 of the statement of claim admitted that the defendant are the disponent owners of the vessel, I truly cannot understand how the 4 telexes had misled the plaintiff in any way. **e**

The plaintiff filed the writ and statement of claim on 16 March 1989 and it is interesting to see that the allegations of fraud only surfaced after that date. In any event, as the contemporaneous documents do not support any of the allegations the plaintiff's declaration to have clause 39 of the charter party unenforceable must fail.

I now consider whether there is any dispute between the parties that merits its determination by arbitration. **f**

In this suit, the plaintiff seek principally to have the charter party declared null and void but this runs contrary to their conduct in settling fully the freight due to the defendant. The plaintiff also contend that they have overpaid the defendant and seek a refund for the overpayment. On the other hand the defendant maintain that there is still a balance of freight due to them from the plaintiff and they intend to counterclaim for the balance. They also aver that the plaintiff's conduct, in offsetting the compensation paid, against the freight due, is wrong as they, the defendant, did not cause the delay that resulted in the compensation being due and payable. **g**

On the facts above, there is clearly a dispute between the parties and if that is not enough, the plaintiff have expressly admitted that such a dispute has arisen which should be arbitrated upon. **h**

In their fax dated 10 May 1988 addressed to the defendant, the plaintiff have, in no uncertain terms, at para. 1 of the fax, admitted that a dispute exists between them and that "clause 39 of the charter party must unfortunately be necessarily exercised".

In another fax also dated 10 May 1988, the plaintiff at para. 1, had again reiterated that a dispute exists between them which can only be settled by arbitration under clause 39. **i**

- a* As the plaintiff had failed to establish a *prima facie* case of fraud against the defendant and since the parties have mutually agreed to have all disputes relating to the charter party decided by an arbitral forum, I had accordingly exercised my discretion and stayed all further proceedings in this suit pending arbitration pursuant to s. 6 of the Act.

Also found at [1990] 2 CLJ 64

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